In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 371

JOHN S. BARNES CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) has not yet been officially reported. The Board's decision and order (Pet. App. A4-A25; R. 1-39)[1] are reported at 165 NLRB No. 58.

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[1] "R." "Tr.", and "G.C. Exh." references are to the printed decisions of the Board and Trial Examiner, the transcript of proceedings, and the General Counsel's exhibits, respectively, filed in the court below.

Petitioner, in the Appendix to its petition (pp. A13-A25), prints only portions of the Trial Examiner's decision. The full decision was reprinted in the record in the court below (R. 10-39).

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1969 (Pet. App. A3). The petition for a writ of certiorari was filed on July 23, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the employer—in distributing to its employees copies of their transcribed testimony given at earlier Board hearings and copies of their signed union authorization cards admitted into evidence in those proceedings—interfered with, restrained and coerced employees in the exercise of rights protected under Section 7 of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix to the petition (pp. A26-A27).

STATEMENT

Prior to November 3, 1965, the Union [2] had filed unfair labor practice charges against petitioner Company with the Board. A complaint and notice of hear-

[2] Lodge No. 1553, International Association of Machinists and Aerospace Workers, AFL-CIO.

ing subsequently issued alleging that the Company had violated Sections 8(a)(1), (3) and (5) of the Act, and on various dates from November 3, 1965, to January 13, 1966, hearings were conducted thereon before a trial examiner.[3] At the hearings, employees Clyde Edwards, Samuel La Sala, and Alice Swift testified under subpoena on behalf of counsel for the General Counsel. In addition, over 100 authorization cards designating the Union as the employees' bargaining representative were introduced into evidence by counsel for the General Counsel (Pet. App. A5, n. 2, A14, n. 3, A15-A19).

Commencing on about January 23, 1966—ten days after the close of the above-mentioned hearings—and during the ensuing three weeks, Company President Ernest Svenson and Plant Manager William J. Stenberg went among petitioner's 200 to 300 employees and—in the presence of their co-workers—gave to each person who testified at the Board proceedings a copy of his or her testimony, and to each employee whose union authorization card had been admitted into evidence a photostatic copy of the card (Pet. App. A16-A23). For example, Edwards—employed by the Company for some 11 years—was approached at work by President Svenson and Plant Manager Stenberg, "carrying folders, portfolios, under their arms" (Pet. App. A16; R. 18; Tr. 32). Svenson then "opened [one] folder and turned it so that [Edwards]

[3] Consolidated for hearing with the unfair labor practice complaint were the Union's outstanding objections and challenges in the representation election previously conducted among the Company's employees.

could read it" and asked: "You are Clyde Edwards" and "This is your card?" (R. 18; Tr. 32-34, 42-43; G.C. Exh. 3). Edwards acknowledged that he had signed the union authorization card, and was then given the folder containing his name typed on an index tab, a copy of his transcribed testimony, and a copy of his signed authorization card (Tr. 35-36; G.C. Exh. 3).[4] In like manner, Svenson and Stenberg approached employees who did not testify at the hearings, but whose union authorization cards had been offered into evidence (Pet. App. A16-A17; R. 18, 37; Tr. 40-41, 131, 175-176, 187-188, 206, 219-220, 341, 377, G.C. Exh. 5). Edwards and his co-workers had not requested copies of these documents (Tr. 37-38, 107-108, 137).

Edwards' and La Sala's photostatic copies of their transcribed testimony contained numerous handwritten markings and comments on various pages (Pet. App. A17; R. 19; G.C. Exhs. 3, 4; Tr. 115, 203). Edwards' copy, for example, was copiously marked

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[4] Svenson and Stenberg similarly approached employee La Sala. Svenson "opened a folder" and asked La Sala—employed by the Company for approximately 17 years: "You are Sam La Sala" and "This is your card?" (Pet. App. A16-A17; R. 18; Tr. 36-37, 107-108, 189, 201-202). La Sala acknowledged his signature; Svenson then stated: "Here is your testimony that you gave at the recent hearing," and, as in the case of Edwards, gave the employee the prepared folder containing his card and testimony (Tr. 201-202; G.C. Exh. 4). Employee Alice Swift—who also signed a card and testified at the Board hearings—was similarly approached and told by Stenberg: "Oh Alice, just so you don't have any hard feelings thinking you are not going to get one, here's a photostatic copy of a card you signed and the testimony at the hearing" (R. 18; Tr. 122, 129-130, 134-135, 141-142, 343-344).

in the margin by Company representatives[5] with handwritten comments, such as (R. 19; G.C. Exh. 3):

This man has only one eye

* * * *

Damn

* * * *

Plain lie

* * * *

This must have been fabricated in the union hall —there is no truth in it.

* * * *

I have not and would not shake hands with Edwards.

* * * *

It will be important to analyze the poor eye of Edwards by using medical opinion.

Marginal notations such as "Hit", exclamation marks, and similar markings appeared on both Edwards' and La Sala's copies (G.C. Exhs. 3, 4).[6]

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[5] Plant Manager Stenberg testified that "three or four or maybe even as many [as] a half dozen" employees were given photostatic copies of their testimony prepared from the Company's "working papers"; these employees received copies "marked up by the [Company's] attorney, by [Svenson], by several other people and [were] used to prepare our case * * *". Stenberg explained that distribution of the marked copies was "a mistake." (Pet. App. A18; Tr. 344-345, 349, 351, 357.) President Svenson also testified that this was an "accident" (Tr. 377-378). The trial examiner, it should be noted, stated that the distribution of the copies of the testimony and cards, "whether marked up or not," amounted to "a not too subtle form of coercion" of the employees involved (Pet. App. A18).

[6] Employee Bennie Hagen was given a folder containing a *typewritten* copy of a union authorization card bearing his

Petitioner's top management personnel, in making the above distribution among the pro-union employees, appeared "agitated," "stern," and "sarcastic". Employee Edwards observed that "Svenson's voice was quite loud, * * * he was waving his hands * * * as if agitated * * * [and his] face was quite red" when making distribution to him and co-worker La Sala (Pet. App. A18; R. 19-20; Tr. 37-38). La Sala agreed that Svenson "was pretty stern" and "looked sort of mad" at the time (Tr. 203). Employee Swift observed that Svenson "was quite rough voiced to them * * * very stern acting" and "sarcastic" (Tr. 133, 136, 176-177). As one employee testified, Svenson "was quite rough voiced to [card signers], and he wasn't smiling. * * * But, then, when he talked to an employee who had not signed a card, he laughed with her about it because he didn't have any for her" (Tr. 132-133). Similarly, as Svenson handed copies of testimony to supervisors and other personnel who had not signed union cards, he noticably "patted [them] on the back * * * [and] they were * * * laughing" (Tr. 141-143, 206-207); he also "shook hands" with them (Tr. 180, 206-207); and "they were all laughing" (Tr. 180).[7]

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printed signature, and an attached sheet of paper which stated (Pet. App. A16, A23; R. 18, 37; Tr. 40-41, 220; G.C.Exh. 5):

> Question—Did Clyde B. Edwards execute the handprinting on Authorization Card No. 36 reading: "Benny Hagen 5/21/67 7th St. Rockford"?
>
> Opinion—In my opinion, Clyde B. Edwards executed the handprinted entries described above.

[7] Before the Board, the Company could offer no business reason for this unusual distribution among its employees after

On this record, the Board, in agreement with the trial examiner, found that the Company had engaged in conduct which "tends to deter employees from union activity or adherence and to desist from giving testimony under the Act. The elaborate, formalized ceremony engaged in by the two top executives of [petitioner] * * * was designed to impress the employees with the seriousness with which [the Company] viewed such employee activity * * * and that [the Company] looked with disfavor upon those who signed union authorization cards" (Pet. App. A18-A19; R. 19-20). Accordingly, the Board concluded, in relevant part, that the Company had interfered with the employees' Section 7 rights in violation of Section 8(a)(1) of the Act, and directed the Company to cease and desist from such conduct and post a notice to that effect (Pet. App. A19-A22; R. 7-8).

The court of appeals sustained the Board's finding as supported by substantial evidence and enforced its order (Pet. App. A1-A2).

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the close of the prior hearings (Pet. App. A18-A19; R. 20; Tr. 342, 376). Svenson, assertedly, wanted each of the employee witness to know "what he was saying" and have " a copy if he needed it in the future" (Tr. 376). Stenberg explained that management also wanted the employees "who allegedly had signed cards * * * and did not testify * * * to receive copies [of those] they had allegedly signed" and which were admitted into evidence in the previously closed hearings (Tr. 341).

ARGUMENT

Contrary to petitioner's contention, no issue with respect to an employer's free speech right to communicate his views on unionization to his employees is presented here. Rather, what is involved in the instant case simply is conduct, not speech. See *United States* v. *O'Brien*, 391 U.S. 367, 378. Here the Board found that the manner and surrounding circumstances in which petitioner distributed photostatic copies of the employees' testimony and the authorization cards were calculated to impress upon the employees that those who had signed such cards or given testimony unfavorable to petitioner had incurred or risked its disfavor. So viewed, the Board concluded, the distribution tended to deter employees in the exercise of their statutory rights of organization and collective activity, in violation of Section 8(a)(1) of the Act. The issue thus presented is of an evidentiary character and does not warrant further review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the facts here adequately support the Board's conclusions, affirmed by the court below, that petitioner's conduct tended to inhibit the employees from freely exercising their rights under the Act. The test of interference, restraint or coercion under Section 8(a)(1) is whether the employer engaged in conduct which, particularly in the absence of any legitimate justification for the employer's action, may reasonably be said to tend to interfere with the free exercise of employee rights under Section 7.

National Labor Relations Board v. *Burnup & Sims, Inc.*, 379 U.S. 21, 23-24; *Textile Workers* v. *Darlington Manufacturing Co.*, 380 U.S. 263, 268-269; *Time-O-Matic, Inc.* v. *National Labor Relations Board*, 264 F.2d 96, 99 (C.A. 7). Here the Board could "conceive [no] legitimate purpose in the distribution, so soon after the close of the former hearing and under the accompanying circumstances" (Pet. App. A19). Accordingly, it was within the Board's competence, whose special insight into the impact of employer conduct upon employees this Court recently noted in *National Labor Relations Board* v. *Gissel Packing Co.*, No. 573, 1968 Term, decided June 16, 1969 (slip op., p. 42), to conclude as it did that the elaborate and formalized ceremony which petitioner staged, in giving the employees copies of their testimony and authorization cards, tended to impair the exercise of employee rights under the Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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